

**DEPARTMENT SIXTEEN - JUDGE SCOTT L. KAYS  
TENTATIVE RULINGS SCHEDULED FOR  
TUESDAY, JANUARY 11, 2011**

**ZOLLARS v. KAHAN (Consolidated)  
Case No. FCS031010**

Motion to Tax Costs filed by Quality Loan Service Corporation

Motion to Strike Memo of Costs and/or Tax Costs filed by Zollars

Motion for Attorney's Fees filed by Kahan

**TENTATIVE RULING**

**Motions to Strike / Tax Costs**

The motions to strike the memorandum of costs are granted. Kahan's memorandum of costs is untimely. Rule 3.1700(a) of the California Rules of Court requires that a memorandum of costs be filed within 15 days of the date the notice of entry of judgment is served. In this case, the notice of entry of judgment was served by mail on September 20, 2010. Adding five days for service of the notice by mail, the time period for filing the memorandum of costs expired on October 10, 2010. Kahan's memorandum of costs, filed on November 12, 2010, was well beyond this time limit.

The court's ruling renders moot the parties' motion to tax the \$302.00 cost item contained in the memorandum of costs.

**Motion for Attorney Fees**

The motion for attorney fees is granted in part. The court awards Kahan \$150,000.00 for the reasonable attorney fees incurred in the unlawful detainer action and the quiet title action. None of the costs incurred in these actions is included in this amount because they are not recoverable on this motion.

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**TOLENTINO v. PAUL FINANCIAL, LLC., GMAC, et al.  
Case No. FCS036194**

Demurrer of GMAC Mortgage, Inc.

**TENTATIVE RULING**

The unopposed demurrer of GMAC is sustained, without leave to amend, for failure to state facts sufficient to constitute a cause of action. CCP 430.10(e).

**First and Second Causes of Action:** Plaintiff fails to allege facts that constitute the elements of causes of action for fraud/negligent misrepresentation against GMAC; she fails to allege facts showing how, when, where, to whom and by what means the representations were tendered. Civil Code Sec. 1709; *Lazar v. Superior Court* (1996) 12 Cal. 4th 631; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal. App. 4th 967; *Small v. Fritz* (2003) 30 Cal. 4th 167; *Tarmann v. State Farm Mutual Auto. Ins. Co.* (1991) 2 Cal. App. 4th 153. Plaintiff has not alleged and cannot allege facts that GMAC was involved in the negotiation of Plaintiff's loan. Plaintiff alleges GMAC is a loan servicer. Prior to loan origination on May 4, 2007, there was nothing to service. Plaintiff admits she obtained a loan on her property, that the loan documents are dated May 4, 2007, and that she was required to, and did, make the payments. She admits she remitted payments to GMAC. She does not allege facts demonstrating (1) that any other entity has claimed a right to the payments; (2) that any other entity has charged her a late charge or found her to be in default for failing to make payments to anyone other than GMAC; or (3) that GMAC did not apply her payments to her loan. The Deed of Trust (RJN Ex. A), at paragraphs 20, 1 and 15, identifies the collector of the loan payments as the "loan servicer" and authorizes notice to plaintiff regarding the address she is to use when remitting payments on her loan. GMAC is not required to possess/produce the note in order to collect payments from plaintiff. *Finley v. LaSalle Bank Nat'l Assn.*, 2009 U.S. Dist. LEXIS 101681, 7-8 (N.D. Cal. Oct. 20, 2009). A party need not possess/produce the note in order to conduct nonjudicial foreclosure proceedings. *Clark v. Countrywide Home Loans, Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 U.S. Dist. LEXIS 79915 (E.D. Cal. Aug. 9, 2010); *Chilton v. Federal Nat. Mortgage Assn.*, 2009 U.S. Dist. LEXIS 129577 (E.D. Cal. Dec. 23, 2009).

**Eighth Cause of Action:** Plaintiff alleges facts pertaining to conduct during the negotiation of plaintiff's loan, but does not allege facts demonstrating GMAC, the loan servicer, was involved prior to the loan closing date, May 4, 2007. Plaintiff has not alleged facts demonstrating financial elder abuse by GMAC. Welfare and Institutions Code Sec. 15610.30. *Perlin v. Fountain View Management, Inc.* (2008) 163 Cal. App. 4th 657. Plaintiff admits she owes the payments and admits that she made those payments to GMAC. She does not allege facts demonstrating (1) that any other entity has claimed a right to the payments; (2) that any other entity has charged her a late charge or found her to be in default for failing to make payments to anyone other than GMAC; or (3) that GMAC did not apply her payments to her loan. The Deed of Trust indicates a loan servicer may collect the loan payments; plaintiff is entitled to receive notification of the loan servicer's name and address. (Paragraph 20, 15 and 1). Plaintiff fails to allege facts demonstrating an agency relationship between GMAC and Paul Financial. *Moore v. Regents of the Univ. of California* (1990) 51 Cal. 3d 120. The unopposed Request for Judicial Notice is granted.

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**RAMOS, ET AL. v. U.S. BANK, N.A., ET AL.**  
**Case No. FCS036466**

Special Motions to Strike

**TENTATIVE RULING**

Defendants' special motions to strike Plaintiffs' complaint are denied.

Plaintiffs have adequately established that there is a reasonable probability that they will prevail on their claims. (Code Civ. Proc. § 425.16(b)(1); *Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) Plaintiffs allege only two causes of action: malicious prosecution for Defendants' second unlawful detainer action filed against them and the unfair business practice of maliciously prosecuting unlawful detainer actions against tenants, such as themselves, protected by the Protecting Tenants at Foreclosure Act.

In support of their malicious prosecution claim, Plaintiffs have submitted evidence establishing favorable termination, lack of probable cause, and malice. (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871-872; *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1147.) Not only is voluntary dismissal presumed to be favorable termination on the merits (*Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1400; see, *Eells v. Rosenblum* (1995) 36 Cal.App.4th 1848, 1855; *Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184-185), the circumstances surrounding the trial management conference immediately preceding Defendants' request for dismissal suggests a determination on the merits and not some technical or procedural reason. Given the promissory note and the two lease documents presented during the trial of the parties' first unlawful detainer, expressly indicating that "[t]enant has prepaid this lease in the amount of Sixty Seven Thousand, Six Hundred Forty Eight and 12/100 (\$67,648.12)," and the judgment of the trial court concluding that the agreement constituted an arms-length transaction protected by the Protecting Tenants Act, Defendants lacked probable cause to pursue unlawful detainer based on the nonpayment of rent between the months of October 2009 to January 2010. (*Sheldon*, 47 Cal.3d at 885-886.) And, the requisite malice may be inferred from the lack of probable cause, keeping in mind that malice can range from open hostility to indifference, and the circumstantial evidence, including an apparent failure to conduct any investigation or discovery into the merits of the claims, the lack of ambiguity in the documents offered in the trial of the first unlawful detainer and credited as an arms-length transaction by the court, and the total number of unlawful detainer actions filed against Plaintiffs. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39

Cal.4th 260, 292; see, *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675; *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498.)

The Court notes that Plaintiffs' unfair competition claim is derived from their malicious prosecution allegations, though they attempt to expand their claim to allege that Defendants have engaged in a pattern and practice of maliciously prosecuting unlawful detainer actions against other protected tenants. An unfair competition claim may be based on a single act or transaction. (Bus. & Prof. Code § 17200; *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 570.) Moreover, because the cause of action is based on malicious prosecution, the Court finds that the absolute litigation privilege afforded by Civil Code section 47 is inapplicable. (See, *Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241-1242; *Hagberg v. Cal. Fed. Bank FSB* (2004) 32 Cal.4th 350, 360; *Kimmel v. Goland* (1990) 51 Cal.3d 202, 209.)

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**HICKMAN, et al. v. VITAMIN WORLD, INC.**  
**Case No. FCS036810**

Demurrer filed by Defendant Vitamin World, Inc.

**TENTATIVE RULING**

The demurrer filed by defendant Vitamin World, Inc., is sustained under CCP Section 430.10(c). Another action pending in California, namely, *Hamilton v. Vitamin World, Inc.*, Alameda County Superior Court Case No. RG 10524008, of which the court takes judicial notice, involves the same parties and the same causes of action as those in the present case. Therefore, the court stays the present action until the *Hamilton* case is concluded.